UNIVERSITY OF WASHINGTON

SCHOOL OF LAW

October 12, 1998

Office of the Secretary
1919 M Street, NW
Room 222
Washington, D.C. 20554

Dear Mr. Secretary and Members of the Commission:

Attached please find comments relating to "Carriage of the Transmissions of Digital Television Broadcast Stations," CS Docket No. 98-120. I have enclosed one original and nine copies of these comments.

Sincerely,

Meade Emory

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Professor of Law

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Carriage of the Transmissions of	)	CS Docket No. 98-120
Digital Television Broadcast Stations	)	

Comments of Professor Meade Emory, Seattle, Washington

Professor Meade Emory
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Dated: October 13, 1998

On behalf of myself, a concerned C-SPAN viewer, I hereby file comments released in the above captioned docket on July 10, 1998 in the matter of Carriage of the Transmission of Digital Broadcast Stations, CS Docket No. 98-120.

INTRODUCTION

In the Notice, the Commission seeks comments regarding the possible application of must-carry and retransmission consent provisions of the Communications Act to new, digital television stations. See Notice, at par. 1-2. In considering the future of broadcasting in the United States, the Commission should not ignore the potentially devastating effects that the application of must-carry rules to digital channels will have on C-SPAN1/2. These channels provide critically important public interest programming.

I. Congress Has Not Mandated Must-Carry Status for Digital Television Stations.

Congress amended the Communications Act to include new retransmission consent and must-carry provisions in 1992, well before the Commission's final decision to authorize a new digital television service. Subsequent to 1992, Congress has passed legislation that facilitates the creation and operation of a new digital television service. Significantly, however, Congress did not amend Section 534 of the Act to include new digital television stations within the scope of the must-carry provisions or in any way intimate that cable system operators would be required to double the number of cable channel positions allocated to commercial television stations. Given the dramatic effects of such a requirement on non-broadcast cable programmers, such as C-SPAN1/2, it is

quite telling that Congress failed to amend section 534 to provide for dual mode must-carry rights.

It is particularly important to note that nothing in section 534 suggests that a cable system operator must offer duplicative programming. On the contrary, section 534 expressly provides that "a cable operator shall not be required to carry the signal of any local commercial television station that substantially duplicates the signal of another local commercial television station which is carried on its cable system, or to carry the signals of more than one local commercial television station affiliated with a particular broadcast network (as such term is defined by regulation)." 47 U.S.C. sec. 534(b)(5). Yet, if the Commission were to order must-carry status for new digital stations, it would surely violate the non-duplication provisions of section 534. It is well-established that most digital broadcasters intend to "simulcast" identical programming on their NTSC and digital frequencies. See "List of DTV Stations on Air Grows By 3 In One Day," Comm. Daily, Mar. 3, 1998 (reporting that most DTV programming is simply simulcast of NTSC programming.) Accordingly, the substance of the programming will be identical, only the format in which the programming is delivered will vary: One station will provide the programming in NTSC format, whereas the second station signal will broadcast the same programming in digital format.

The objective of the non-duplication rule, therefore, which is to enhance program diversity, will be undermined by applying the must-carry rules to digital stations that do little more than simulcast the same programming provided on NTSC stations. When one

factors in Congress's failure to amend either section 534 or 325(b) in the Telecommunications Act of 1996, it becomes reasonably clear that the Commission lacks the authority to mandate must-carry status for new digital stations while maintaining a must-carry requirement for pre-existing NTSC commercial television stations.

II. **According Digital Commercial Broadcast Stations Must-Carry Protection While According NTSC Commercial Broadcast Stations Must-Carry Protection Violates the First Amendment Rights of Cable System Operators and Cable System Viewers.**

In *Turner Broadcasting System v. Federal Communications Commission,* a bare majority of the Supreme Court sustained the must-carry provisions of 47 U.S.C. sec. 534 from a First Amendment challenge brought by cable system operators and programmers. See 512 U.S. 622 (1994). Significantly, all of the Justices agreed that cable system operators and programmers "are entitled to the protection of the speech and press provisions of the First Amendment." Id. at 636. The majority sustained the must-carry provisions of the Cable Act largely on the basis that the legislation would ensure "a multiplicity of information" that would enhance the diversity of the marketplace of ideas. See id. at 662-63. The majority also placed substantial reliance on Congress's assertion that the must-carry rules constituted content neutral rules designed to ensure that broadcast television stations' programming would find its way to local cable systems. See id. at 665-68. On the strengths of these asserted interests, the majority deemed the law arguably constitutional, provided that the government could provide a sufficient factual predicate for its conclusions about the power imbalance between cable system operators and commercial television broadcasters. See id. at 667-68.

Mandating must-carry status for digital television stations will not enhance the diversity of the cable programming market. On the contrary, it will decrease the net diversity by doubling the number of channels dedicated to providing identical programming content. In turn, this will cause smaller cable television networks such as C-SPAN1/2 off the air. C-SPAN1/2 provides a unique perspective on the news and it is unlikely that the type of programming provided by C-SPAN1/2 will be made available anywhere else on television. It would be a tragedy, therefore, if must-carry requirements forced C-SPAN1/2 off the air. The information provided on C-SPAN1/2 is invaluable to me as a professor and as someone interested in the workings of the federal government.

CONCLUSION

The Commission should reject proposals for digital must carry requirements. They should be rejected because such proposals are inconsistent with the plain language of the Cable Act of 1992 and because they violate important First Amendment principles.

Respectfully submitted,

PROFESSOR MEADE EMORY